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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

GILLIAN OROZCO, Plaintiff and Appellant, v. MICHAEL WILHOITE, Defendant and Respondent.	C086014 (Super. Ct. No. 16FL06722)

Appellant Gillian Orozco appeals the trial court's original order and modification of that order regarding child support from respondent Michael Wilhoite, the co-parent of their daughter, S.W.[1] At the time of these orders, Wilhoite was a professional football player with an average gross monthly salary of $108,333.33. Wilhoite stated that he was willing to pay reasonable child support, but objected to the amount calculated under the

[1] Pursuant to California Rules of Court, rule 8.90(b)(1), we refer to the daughter by her initials.

statutory guideline formula, Family Code section 4055,[2] as exceeding the needs of S.W. Based on Wilhoite's income, the guideline amount was $6,770. Pursuant to section 4057, subdivision (b)(3), the trial court determined that Wilhoite had an extraordinarily high income and the amount determined under the guideline would exceed S.W.'s needs. The court ordered monthly child support in the amount of $2,000 and reaffirmed that amount on Orozco's motion to modify child support when she lost her job.

We conclude the court erred because Wilhoite failed to carry his burden to provide sufficient evidence that the guideline amount exceeded S.W.'s needs. Wilhoite presented no evidence quantifying her needs and ignored evidence Orozco submitted regarding the cost of housing to elevate S.W.'s standard of living with her mother to what was attainable with his income.

We also conclude that the court erred because it provided a cursory explanation and cited no evidence in support of its decision. A statement of the court's reasons for departing from the guideline and why the lower award is in the best interests of the child is mandatory. Here, not only was the statement minimal, the court failed to take into account that a child is entitled to share in the lifestyle of the wealthier parent.

Consequently, we reverse the original child support order. Because we conclude the original order was invalid, we do not address the trial court's order declining to modify the child support amount.

FACTUAL AND PROCEDURAL BACKGROUND

Orozco and Wilhoite are not married. They are the parents of a daughter, S.W.

On May 4, 2017, Orozco filed a petition for child support and attorney fees and costs. At the time, Wilhoite was a professional football player who had played for the San Francisco 49ers and was signed with the Seattle Seahawks for the 2017-2018 season.

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[2] Unless otherwise designated, all statutory references are to the Family Code.

Wilhoite's average gross monthly salary from the Seahawks was $108,333.33. Orozco was working as a dental billing associate, making $18 an hour and working 30 to 35 hours a week. Her average monthly income was $2,635.

In support of her petition, Orozco submitted two income and estimated expense declarations, one on May 4, 2017, and the other on June 12, 2017. None of the expenses itemized related directly to S.W.'s needs. Orozco's first expense declaration estimated her total expenses at $3,650, with $1,300 of her expenses paid by others. Orozco's second income and expense declaration showed two estimated expense scenarios, one involving "[p]roposed needs" and the other "[a]ctual expenses." The proposed need expenses totaled $9,056, with no expenses paid by others. The actual expenses amounted to $5,191, with $3,750 paid by others.

Orozco lived in her mother's home with her mother, her sister, and her three children. The proposed needs estimate for home rental was $2,500, with none of Orozco's expenses paid by others. The actual expenses estimate for rent was $1,950, with more than 50 percent of Orozco's total expenses paid by others. Wilhoite presented rebuttal evidence regarding the actual rental expense in the form of Orozco's deposition testimony that she paid her mother $600 per month in rent. The higher rent in Orozco's proposed needs declaration was in anticipation of moving her family out of her mother's house.

Wilhoite also submitted an income and expense declaration. He listed his rent expense as $5,500 for housing in Seattle and Sacramento. Wilhoite lived alone in both locations. Wilhoite described his living arrangement in Seattle as follows: "I have found a home 4 minutes from where I work, which will accommodate [S.W.] so I have had to pay more for rent ($2,500) than I would have liked to pay on my own." When in Sacramento, Wilhoite lived in a furnished "house [that] is less expensive than a hotel would [be] and permits me to have a real space for [S.W.] but is more money than I want

to spend. I will reorganize things when the custody schedule is determined, but for now, I pay $3,000 per night for this residence, plus a portion of utilities."[3]

Wilhoite declared that "I have no objection for paying reasonable support for [S.W.] but I do object to paying [Orozco] support at the State Guideline because I believe it is unreasonably high, beyond reasonable needs as a four-month old." He concluded: "I realize that [S.W.] has the right to live in a standard that reflects mine, but my 'standard' is not excessive or extravagant. I do not live [a] lavish lifestyle and I question whether [S.W.], at 4 months, would know the difference, if one existed."

The July 10, 2017 hearing on the motion for child support was not reported. The parties have submitted a settled statement in lieu of a transcript. At the hearing, Orozco's counsel argued, inter alia, that child support calculated using the guideline formula was presumptively correct. Counsel contended that Wilhoite would have to demonstrate that application of the formula was unjust and a downward deviation would be in the child's best interest, i.e., the guideline amount exceeded the child's needs and would be detrimental to the child.

Wilhoite's counsel argued that Wilhoite had set forth S.W.'s estimated monthly expenses in his declaration (but did not refer to any particular expense itemized in his declaration). Counsel contended the guideline was unreasonable in light of the short duration of Wilhoite's remaining National Football League (NFL) career, the needs of a three-month old infant, Wilhoite's extraordinary travel and housing costs due to parenting S.W. in two cities, and the high work-related expenses of a professional athlete. Counsel stated that due to the impending end of Wilhoite's NFL career, he did not maintain a high standard of living. Counsel further argued that Orozco's expenses were inflated to obtain a higher support award. Counsel acknowledged that while "expenses would increase due

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[3] On appeal, Orozco accepts that the amount of $3,000 stated in Wilhoite's declaration was an error and he meant $300.

to the addition of another child and the desire to relocate to new housing, [Orozco's] represented expense increases largely did not bear any relation to the new child."

On July 10, 2017, the trial court issued its findings and order after hearing. The court ordered Wilhoite to pay Orozco $2,000 in child support each month effective July 1, 2017. The court attached to the order a guideline support calculation for a $6,770 monthly award, which the court stated is presumptively correct but may be rebutted by evidence showing the formula amount would be unjust or inappropriate.

The trial court explained the departure from the guideline as follows: "In the case at bar, the child is 4 months old and evidence has not been presented the needs of the child are remarkable or out of the ordinary. Additionally, evidence supports the conclusion neither parent lives an extravagant lifestyle." Citing section 4057, subdivision (b)(3), the court found that Wilhoite "has an extraordinarily high income" and "the guideline child support award of $6,770 substantially exceeds the needs of this 4 month-old child. As such, the Court sets temporary child support in the amount of $2000 per month."

On July 14, 2017, the court amended the order to add this sentence: "Finally, for the reasons stated herein and pursuant to Family Code § 4056(a)(3), the issuance of this below-guideline support order is consistent with the best interests of the child."

Orozco brought a motion to vacate the order, which ultimately was heard by a different judge, the original judge being unavailable. The judge presiding at the hearing concluded that the original order did not comply with the requirements of section 4056, subdivision (a), in failing to articulate the reasons why the support ordered differs from the guideline and why the amount of support is consistent with the best interests of the child. The court found that the above-quoted statements in the original order about the lack of evidence of " 'remarkable or out of the ordinary' " needs of S.W. impermissibly shifted the burden to Orozco, when it was Wilhoite's burden to show the deviation below the guideline was appropriate. Also, the court concluded reliance on Orozco's historic

expenses contravened the principle that the child's needs are measured by the parents' current station in life and the standard of living attainable by their income, regardless of their expenditures.

The court vacated the original support order but did not enter a new order, concluding that Orozco's motion for child support was still pending. The parties deemed this ruling unsatisfactory, which led to a stipulation and order on October 25, 2017, reinstating the original order and preserving Orozco's right to appeal it. On October 30, 2017, Orozco appealed from the original order.

Orozco also appealed from the trial court's order of January 31, 2018, amended on February 2, 2018, declining to modify the monthly child support award of $2,000. Because we reverse the court's original child support order, we do not reach Orozco's contention that, even if the original child support order was valid, the court abused its discretion by not increasing the child support amount.[4] On remand, we direct the trial court to enter an order in the guideline amount of $6,770 per month, but leave to the court's discretion whether to make the order retroactive to the date the original petition was filed.

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[4] Wilhoite filed a motion to dismiss the second appeal, arguing that the court's ruling was not an appealable order but a mere continuance. We denied the motion. We also now deny Wilhoite's motion to strike the portions of Orozco's reply brief regarding the second appeal, in which he renews the argument. In addition, Wilhoite asks us to take judicial notice of subsequent events to show that the trial court's order on Orozco's motion to modify the child support award is not an appealable order but a mere continuance. We deny this request. " 'Except in rare cases where events subsequent to the ruling under review have rendered the case totally moot, we do not, and may not, consider subsequent events.' " (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 281, fn. 3 (*Cheriton*); *In re Marriage of Jacobs* (1981) 126 Cal.App.3d 832, 835.)

DISCUSSION

Standard of Review

We apply the abuse of discretion standard to the issues Orozco raises. As stated in *Cheriton*: "First, child support awards are reviewed for abuse of discretion. [Citations.] We observe, however, that the trial court has 'a duty to exercise an informed and considered discretion with respect to the [parent's child] support obligation . . . .' [Citation.] Furthermore, 'in reviewing child support orders we must also recognize that determination of a child support obligation is a highly regulated area of the law, and the only discretion a trial court possesses is the discretion provided by statute or rule. [Citations.]' [Citation.] In short, the trial court's discretion is not so broad that it 'may ignore or contravene the purposes of the law regarding . . . child support. [Citations.]' [Citation.]" (*Cheriton, supra*, 92 Cal.App.4th at pp. 282-283; *Y.R. v. A.F.* (2017) 9 Cal.App.5th 974, 982-983.)

Wilhoite Failed to Carry His Burden of Proof

Strong public policy in California favors adequate child support. (*Cheriton, supra*, 92 Cal.App.4th at p. 283.) California's statewide uniform child support guideline statutes embody this policy. (*Ibid.*; §§ 4050-4076.) The term " 'guideline' " is actually "a euphemism. The support amount rendered under the guideline's algebraic formula 'is intended to be presumptively correct in all cases, and only under special circumstances should child support orders fall below the child support mandated by the guideline formula.' (§ 4053, subd. (k); see also §§ 4050, 4057, subd. (a).)" (*In re Marriage of Hubner* (2001) 94 Cal.App.4th 175, 183 (*Hubner*).) Accordingly, Orozco's position was fully justified that the guideline level of support was appropriate. It was not her burden to do anything more.

Wilhoite sought to persuade the trial court that this case came within a special circumstance identified by the guidelines as warranting a downward departure. Section

4057, subdivision (b), provides in relevant part that the guideline formula "may be rebutted by admissible evidence showing that application of the formula would be unjust or inappropriate in the particular case, consistent with the principles set forth in Section 4053." In this instance, section 4057, subdivision (b)(3), provides for a departure when "[t]he parent being ordered to pay child support has an extraordinarily high income and the amount determined under the formula exceeds the needs of the children."

The burden of proof of providing evidence to the trial court regarding this high-income exception rests squarely on the parent seeking to invoke it. (*In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1326 (*Wittgrove*); *Hubner, supra,* 94 Cal.App.4th at p. 183.) The parent must show that he or she has an extraordinarily high income *and* the guideline support exceeds the child's needs. (*Hubner, supra*, at p. 183.) "[I]t is that parent's 'burden to establish application of the formula would be unjust or inappropriate,' and the lower award would be consistent with the child's best interests. [Citations.]" (*Ibid.*)

On appeal, Orozco does not challenge the trial court's finding that Wilhoite is an extraordinarily high income earner. The issue is whether Wilhoite overcame the presumptively correct guideline support amount because that amount exceeded the needs of S.W. Orozco contends that he did not.

Section 4057, subdivision (b)(3), "does not offer guidance on how courts are supposed to measure the supported child's 'needs' . . . , leaving the matter to the guideline's general policy directives and a body of well-developed case law." (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2019) ¶ 6:259, pp. 6-189 to 6-190.)

Under the statutory guidelines, the interests of the child are given the "state's top priority." (§ 4053, subd. (e).) "A parent's first and principal obligation is to support his or her minor children according to the parent's circumstances and station in life." (§ 4053, subd. (a).) Accordingly, the guidelines mandate "[c]hildren should share in the

standard of living of both parents. Child support may therefore appropriately improve the standard of living of the custodial household to improve the lives of the children." (§ 4053, subd. (f).)

Per case law, "[a] child's ' "needs" ' are not determined under an objective standard. [Citations.] ' "What constitutes reasonable needs for a child varies with the circumstances of the parties." ' [Citations.]" (*Y.R. v. A.F., supra,* 9 Cal.App.5th at pp. 983-984.) "A child's need is measured by the parents' current station in life" (*In re Marriage of Kerr* (1999) 77 Cal.App.4th 87, 96), and by "the standard of living attainable by the income available to the parents rather than by evidence of the manner in which the parents' income is expended and the parents' resulting lifestyle." (*White v. Marciano* (1987) 190 Cal.App.3d 1026, 1032.) It is "well established that '[a] child, . . . , is entitled to be supported in a style and condition consonant with the position in society of its parents.' [Citation.]" (*McGinley v. Herman* (1996) 50 Cal.App.4th 936, 941 (*McGinley*).) "Clearly where the child has a wealthy parent, that child is entitled to, and therefore 'needs' something more than the bare necessities of life." (*White v. Marciano, supra,* at p. 1032; see *In re Marriage of Chandler* (1997) 60 Cal.App.4th 124, 129.)

" 'The father's duty of support for his children does not end with the furnishing of mere necessities if he is able to afford more.' [Citation]." (*McGinley, supra,* 50 Cal.App.4th at p. 941.) " '[W]here the supporting parent enjoys a lifestyle that far exceeds that of the custodial parent, child support must to some degree reflect the more opulent lifestyle even though this may, as a practical matter, produce a benefit for the custodial parent.' " (*Johnson v. Superior Court* (1998) 66 Cal.App.4th 68, 71, quoting *In re Marriage of Catalano* (1988) 204 Cal.App.3d 543, 552.) "[T]he parent with a higher standard of living has the obligation to ensure his or her children share in that lifestyle." (Hogoboom & King, Cal. Practice Guide: Family Law, *supra,* ¶ 6:406, at p. 6-258.)

Applying these principles, it was up to Wilhoite to introduce evidence regarding S.W.'s needs and best interests to rebut the presumptively correct guideline support amount. Wilhoite, however, provided no evidence of S.W.'s particular needs.

It was apparent, however, based on the parents' respective income and expense declarations, that S.W.'s lifestyle with her father versus her mother differed concerning housing that Wilhoite was able to afford. With Wilhoite, S.W. lived alone with her father in a townhouse in Seattle or a furnished house in Sacramento. With Orozco, S.W. lived in a house with her mother, her grandmother, her mother's sister, and two half-siblings.

Wilhoite could have submitted evidence to establish reasonable rental and/or purchase cost and availability of housing in the Sacramento area where S.W. could live with her mother and half-siblings and potentially have her own room. Instead, Wilhoite simply declared that the guideline is "beyond reasonable needs as a four-month old" and "I do not live [a] lavish lifestyle and I question whether [S.W.], at 4 months, would know the difference, if one existed."

Moreover, the line item regarding the cost of a home in Orozco's "[p]roposed needs" versus "[a]ctual expenses" declarations submitted in June 2017 did to some extent quantify S.W.'s needs for a lifestyle consistent with what she enjoys with her father. Orozco's actual claimed monthly rental expense in the house she shares with her mother, her sister, and her three children was $1,950, which Wilhoite contended was in fact $600 based on Orozco's deposition testimony of what she paid her mother, with $3,750 of the total expense of $5,191 paid by "others" (her mother, according to evidence Wilhoite submitted). On the other hand, Orozco's proposed need expense for rent was $2,500, with no contribution from "others" to payment of the total $9,056 in claimed expenses. This evidence suggests that Orozco's monthly rental expense alone to provide a home with accommodation for S.W. at the level that Wilhoite provided would amount to $1,900. Wilhoite's counsel acknowledged at the July 10, 2017 hearing that Orozco's expense declaration estimating S.W.'s proposed needs would show that "expenses would

increase due to the addition of another child and desire to relocate housing . . . ." Orozco's expense declarations constituted evidence of the amount of that increase.

It was open to Wilhoite to rely on Orozco's expense declarations to calculate an appropriate downward deviation from the guideline. (*Y.R. v. A.F.*, *supra*, 9 Cal.App.5th at p. 987; *S.P. v. F.G.* (2016) 4 Cal.App.5th 921, 930.) However, it would not be proper to measure S.W.'s needs by "historic expenses" for housing, such as set forth in Orozco's "[a]ctual expenses" declaration, as this approach ignores the established principles that a child's need is measured by the parents' current station in life and the child of a wealthy parent is entitled to more than the " 'bare necessities of life.' " (*Cheriton, supra*, 92 Cal.App.4th at p. 293; *Y.R. v. A.F.*, *supra*, 9 Cal.App.5th at p. 984.) In any event, Wilhoite's strategy was solely to attack Orozco's expenses as unrelated to S.W.'s needs and inflated. This approach left Wilhoite without any evidence to support his claim that the guideline amount exceeded S.W.'s needs, beyond his view that a four-month old does not need much and S.W. would not be able to discern a difference between Wilhoite's lifestyle and her mother's.[5]

Wilhoite contends that the trial court can rely on common knowledge in place of evidence to fix a reasonable sum for child support, citing two cases prior to the enactment of the uniform guideline formula: *In re Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33, which in turn relies on *Strohm v. Strohm* (1960) 182 Cal.App.2d 53. Under these cases, determining a child's needs may come " 'within the rule that the trier of fact may fix a reasonable sum where the matters are nontechnical in nature and of common knowledge. [Citations.]' " (*Ostler*, *supra*, at p. 53, quoting *Strohm*, *supra*, at

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[5] In opposition to Orozco's motion for child support, Wilhoite argued that "estimated. . . actual expenditures related to [S.W.] could not be more than $500.00 per month, based upon [Orozco's] representation of her formula consumption, diaper usage, supplies (bottles and wipes) clothing and bedding." There is no citation to any evidence submitted in support of this argument and no mention of the cost of housing.

p. 57.) Common knowledge may be valid for some line items of expense (for example, food, eating out, clothes, entertainment, and travel expenses). Where we part company with Wilhoite is the use of common knowledge to determine the cost of rental housing in the Sacramento area that would provide S.W. with a standard of living elevated from what Orozco would be able to provide on her own income to a standard of living comparable to and based on Wilhoite's station in life and available income.

We conclude that the child support order must be reversed, because Wilhoite failed to carry his burden to provide sufficient evidence that the guideline amount exceeded S.W.'s interests and that a downward deviation was in her best interests.

The Trial Court's Statement of Reasons Was Insufficient

Orozco asserts that the trial court committed reversible error by not making the findings required for a downward deviation below the guideline child support amount. We agree.

Section 4056, subdivision (a)(2), requires the court to provide reasons why the award deviates from the guideline amount. Under section 4056, subdivision (a)(3), the court must also explain why an amount below the guideline is in the best interests of the children. (*Rojas v. Mitchell* (1996) 50 Cal.App.4th 1445, 1450; *Y.R. v. A.F.*, *supra*, 9 Cal.App.5th at p. 985.) The statement of reasons is mandatory; trial courts must "render the specified information sua sponte when deviating from the guideline formula." (*Rojas, supra*, 50 Cal.App.4th at p. 1450, fn. omitted; *Y.R. v. A.F.*, *supra*, 9 Cal.App.5th at pp. 984-985.) Section 4056 requires the court to do "more than issue conclusory findings; it must *articulate* why it believes the guideline amount exceeded the child's needs and why the deviation is in the child's best interests. [Citation.]" (*Y.R. v. A.F.*, *supra*, at p. 985, fn. 16, italics added; *McGinley*, *supra*, 50 Cal.App.4th at p. 945 ["conclusionary finding falls far short of providing *reasons* why the level of support that the trial court awarded is consistent with the child's interests"].)

Here, the trial court's explanation why the child support deviates from the guideline amount and why the amount awarded is in S.W.'s best interests consists of two sentences: (1) "evidence has not been presented the needs of the child are remarkable or out of the ordinary," and (2) "evidence supports the conclusion neither parent lives an extravagant life style."[6] These conclusory findings do not provide reasons why a reduction from the guideline amount is justified and consistent with S.W.'s best interests. (*McGinley, supra*, 50 Cal.App.4th at p. 945; *Y.R. v. A.F., supra*, 9 Cal.App.5th at p. 985, fn. 16.) There are no specific findings as to reasonable monthly amounts for rent, utilities, groceries, eating out, auto expenses, clothing or anything else. (*Y.R. v. A.F., supra*, at p. 985, fn. 16.) The court seems to equate the lifestyles of Orozco and Wilhoite despite all evidence to the contrary, particularly regarding housing accommodations. Moreover, it is telling that the court amended its order to add a wholly conclusory statement that "pursuant to Family Code § 4056(a)(3), the issuance of this below-guideline support order is consistent with the best interests of the child."

We emphasize that the mandatory statement of reasons for a downward deviation from the guideline formula is not satisfied by "checking the box" or a rote recitation to meet statutory requirements. Neither the parents, nor this court, derive from an order of this nature an assurance that the child support award is fair, supports the state policy of placing the child's interest as the top priority, and involves appropriate consideration whether the guideline result should be varied under the circumstances of the case. (*In re Marriage of Hall* (2000) 81 Cal.App.4th 313, 319-320.)

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[6] As the court found on the motion to vacate, comments in the original order about the lack of evidence that S.W.'s needs are "remarkable or out of the ordinary" suggests an impermissible transfer of the burden of proof to Orozco to justify the guideline amount. As discussed, it is the other way around; the burden is on Wilhoite to justify deviation from the guideline amount by showing that it exceeds S.W.'s needs and a lesser amount would be in her best interest. (*Wittgrove, supra*, 120 Cal.App.4th at p. 1326; *Hubner, supra*, 94 Cal.App.4th at p. 183.)

We conclude that the trial court's child support order must be reversed for the additional reason that the court failed to make the requisite statutory findings.

DISPOSITION

The child support order is reversed and remanded with directions that the trial court enter an order in the guideline amount of $6,770 per month. On remand, the court shall determine whether to grant or deny Orozco's request that the child support order be made retroactive to the date the petition was filed. Orozco shall recover her costs on appeal. (Cal Rules of Court, rule 8.278(a)(1) & (2).)

RAYE, P. J.

We concur:

BUTZ, J.

MURRAY, J.